(3)

No. 01-756

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

REGAL FISH LTD.,

Petitioner,

v.

JEFFREY P. FISH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a United States District Court sitting in admiralty may award prejudgment interest upon general maritime and Jones Act damages.

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STATEMENT OF THE CASE

An accurate statement of the case appears at pages A 1-3 (Opinion of the Ninth Circuit Court of Appeals) and B 1-10 (District Court's Findings of Fact and Conclusions of Law) of the appendix of Regal Fish LTD's petition.

REASONS FOR DENYING THE WRIT

The petitioner argues that the Court should reverse the prejudgment interest award finding that prejudgment interest is not available under the Jones Act, 46 U.S.C. App. § 688(a). The petitioner argues for that radical departure from the history of admiralty law on the grounds that prejudgment interest is unavailable under the Federal Employers Liability Act (FELA), under *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330 (1988), and the Sixth Circuit disallows such awards, causing a division between the circuits. Neither of the petitioner's arguments has any merit.

Under Rule 17 of the Court, "[a] review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor." The purpose of certiorari jurisdiction is to permit the Court to select cases "of such gravity and general importance" as to warrant review of the decision below. *In re Woods*, 143 U.S. 202, 206 (1982). For the reasons set forth below, the petitioner's petition is wholly without merit and does not meet the criteria guiding the Court's discretionary review. The petition should accordingly be denied.

A. The Instant Case, Which Involved Combined General Admiralty and Jones Act Claims, Does Not Contain Any Facts or Circumstances that Set it Apart from Other Maritime Cases or Otherwise Make It Suitable for Consideration of a Jones Act Issue.

This is a case in admiralty in which the Honorable Judge Thomas S. Zilly awarded Jeffrey P. Fish prejudgment interest on traditional maritime damages of maintenance, cure and past unearned wages, as well as general damages under the Jones Act, 46 U.S.C. App. § 688(a). The United States Court of Appeals for the Ninth Circuit affirmed the award, citing *Simeonoff v. Hiner*, 249 F.3d 883, 894 (9th Cir. 2001), *Vance v. Am. Haw. Cruises, Inc.*, 789 F.2d 790, 794-95 (9th Cir. 1986), *Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487, 491 (5th Cir. 1985), and *Hillier v. S. Towing Co.*, 740 F.2d 583, 584 (7th Cir. 1984).

Contrary to the petitioner's argument, the decision below does not provide an ideal vehicle for the Court to address the petitioner's purported Jones Act issue. The petitioner is wrong in stating that "the sole issue at this stage of the proceedings is whether prejudgment interest is available under the Jones Act." (Pet. at 25). Mr. Fish's case, like the vast majority of seamen's claims, involved combined general maritime and Jones Act claims. Indeed, as this Court stated in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994): "for practical reasons, a seaman will almost always combine in a single action claims for relief under the Jones Act and general maritime law." 510 U.S. at 457. As such, the instant case falls squarely within the norm of seamen's personal injury claims. There is nothing distinctive about this case that would warrant review by this Court, nor does it present any unique circumstances for examining the Jones Act.

B. The Unavailability of Prejudgment Interest Under the FELA Does Not Alter the Authority of Courts in Admiralty to Award Prejudgment Interest Under the Jones Act.

In *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330 (1988), the Court held that prejudgment interest is unavailable under the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60. 486 U.S. at 336-339. The Jones Act incorporates the FELA by reference when it states that "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply" in a seaman's personal injury action under the Act. 46 U.S.C. App. § 688(a); *Cox v. Roth*, 348 U.S. 207, 208 (1955).

The petitioner erroneously contends that under *Monessen*, prejudgment interest may not be awarded under the Jones Act. The petitioner's argument is contrary to opinions of this Court, as well as numerous opinions from every circuit court that has considered the issue of awarding prejudgment interest on combined general maritime and Jones Act claims.

Although the Jones Act has generally been interpreted to apply substantive provisions of the FELA, this Court has found substantive differences between the two statutes when applying the rules of the FELA "would frustrate the congressional purpose of 'the benefit and protection of seamen who are peculiarly the wards of admiralty.' " *Cox*, 348 U.S. 209, (finding survival of actions against deceased tortfeasors permitted under the Jones Act even though such actions are not provided for under the FELA) (citing *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936) (holding that the FELA assumption-of-risk rule does not apply under the Jones Act)).

In *The Arizona*, this Court explained that the incorporation of the FELA into the Jones Act

> does not mean that the very words of the FELA must be lifted bodily from their context and applied mechanically to the specific facts of maritime events. Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met in the admiralty setting.

298 U.S. at 209. The Court further noted that Congress intended for the Jones Act to provide for the welfare of seamen," and as such, "is entitled to a liberal construction to accomplish its beneficent purposes." 298 U.S. at 210.

Any uncertainty regarding whether there was a conflict between the FELA and the Jones Act on the issue of prejudgment interest has been resolved by this Court in *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189 (1995). In that case, the Court acknowledged that there is no statutory prohibition against prejudgment interest in Jones Act cases and that "[f]ar from indicating a legislative determination that prejudgment interest should not be awarded, . . . the absence of a statute merely indicates that the question is governed by traditional judge-made principles." 515 U.S. at 194, (citing *Monessen*, 486 U.S. at 336-337 and *Rogers v. United States*, 332 U.S. 371, 373 (1947)). Those principles are well developed in admiralty, where "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies." *United States v. Reliable Transfer*, 421 U.S. 397 (1975).

One of the most fundamental "traditional judge-made principles" in admiralty law is that courts sitting in admiralty have the discretion to award prejudgment interest "to ensure that an injured party is fully compensated for its loss." *Milwaukee*, at 195. As the Court stated in *Milwaukee*, "[t]hroughout our history, admiralty decrees have included provisions for prejudgment interest." *Id.*, (citing *In Del Col v. Arnold*, 3 U.S. 333 (1796); *The Amiable Nancy*, 16 U.S. 546 (1818); *The Umbria*, 166 U.S. 404, 421 (1897); *The Anna Maria*, 15 U.S. 327 (1817); *The Manitoba*, 122 U.S. 97, 101 (1887)).

Lower courts have also looked to the history of maritime law to address prejudgment interest issues and focused on the fact that awards of prejudgment interest on general maritime claims were recognized under general maritime law long before the birth of the Jones Act. *See, e.g., Anglada v. Tidewater, Inc.*, 752 F. Supp. 722, 725 (E.D. La. 1990), (citing *The Scotland*, 118 U.S. 507, 518 (1886) (award of prejudgment interest within the discretion of the trial court); *The President Madison*, 91 F.2d 835 (9th Cir. 1937) (citing 19th century cases such as *The Amiable Nancy*, 16 U.S. 546 (1817), in support of its decision to award prejudgment interest); *Thompson Towing & Wrecking Ass'n v. McGregor*, 207 F. 209, 220-222 (6th Cir. 1913)).

The Court did not alter the course of that history when it decided *Monessen*, which strictly addressed the substantive provisions of the FELA. In *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), this Court explained that in *Monessen* it disallowed prejudgment interest under the FELA "in large part because such interest was unavailable at common law when the FELA was enacted." 512 U.S. at 542. The Court thereby emphasized the importance of looking to

common law developments when determining the scope of a statute. The Court further stated that unless common law principles are "expressly rejected in the text of the statute, they are entitled to great weight in our analysis." *Id.* at 544.

As established in *Milwaukee* and *Anglada*, *infra*, the Jones Act stems from a rich common law history replete with prejudgment interest awards and explanations for their allowance. Over two hundred years of admiralty law history demonstrates that prejudgment interest has been consistently left to the discretion of the court when admiralty claims were tried to the court as in the instant case. There is no evidence that the Congress ever intended to remove this fundamental form of compensation from seamen when it passed the Jones Act for the specific purpose of fully compensating seamen for their losses.

In *Randolph v. Laeisz*, 896 F.2d 964 (5th Cir. 1990), this precise analysis was employed by the Fifth Circuit when it considered the same question posed by the petitioner here. There, the vessel owner contended that the trial court erred in awarding prejudgment interest on the ground that the award was prohibited under *Monessen*, 896 F.2d at 968. The *Randolph* court determined that *Monessen* did not affect the long-standing rule that prejudgment interest is appropriate where general maritime actions and Jones Act damages are awarded by a court sitting in admiralty. *Id.* at 968-969. The *Randolph* court recognized that the Court in *Monessen* noted that neither the FELA nor the general federal interest statute makes any mention of prejudgment interest and that the Court relied on Congress' failure to amend the FELA to provide for prejudgment interest in the face of more than seven decades of judicial unanimity wherein state and federal courts have denied such prejudgment interest in the FELA

context. *Id.* (citing *Monessen*, 486 U.S. at 336-38.) The *Randolph* court then noted, by reference to prior Fifth Circuit opinions, that awarding prejudgment interest lies within the sound discretion of the trial judge, and in maritime law, granting the award is the rule rather than the exception. *Id.* (citing *Helaire v. Mobile Oil Co.*, 709 F.2d 1031, 1042-43 (5th Cir. 1993)). Finally, the court found that "[b]ecause Congress has made no indication that prejudgment interest is inappropriate in maritime cases, the award is upheld as proper." *Id.*

C. The Sixth Circuit Allows Prejudgment Interest Awards When the Trial Court Sits in Admiralty and No Peculiar Circumstances Justify its Refusal – Thus, There is No Conflict Between the Circuits.

Huss v. King Co., Inc., 2001 U.S. Dist. LEXIS 19293 (Nov. 14, 2001), a seaman's general maritime and Jones Act claim for personal injuries sustained in the course of employment, is the Sixth Circuit's most recent treatment of this issue. The opinion in *Huss* demonstrates that it follows the approach of all other circuits, which find that prejudgment interest is available in Jones Act admiralty cases, which are tried to the court, absent "peculiar circumstances." *Id.*, at 54 (citing *Bush v. Diamond Offshore Co.*, 46 F. Supp. 2d 515, 523 (E.D. La. 1999) (allowance of prejudgment interest discretionary in Jones Act case tried to the court and not a jury)).

In considering the seaman's claim for prejudgment interest, the *Huss* court initially stated the often-cited rule of that jurisdiction that is emphasized by the petitioner:

> With respect to Jones Act cases in which a seaman is seeking recovery for personal injury or death,

> the general rule is that interest is awarded from the date that the damages have been judicially determined; there is no prejudgment interest from the date of injury.

2001 U.S. Dist. LEXIS 19293 at 53 (citing *Anderson v. Whittaker Corp.*, 894 F.2d 804, 808 (6th Cir. 1990), (citing *Oglebay Norton Co. v. CSX Corp.*, 788 F.2d 361, 367 (6th Cir.), *cert. denied*, 479 U.S. 849, 93 L. Ed. 2d 109, 107 S. Ct. 173 (1986)). However, a close reading of *Huss*, *Andersen* and *Oglebay* reveals that the "general rule" referred to by those courts and the petitioner does not apply to Jones Act claims that are tried before the court rather than a jury.

With respect to the *Huss* opinion, after reciting the "general rule" above, the court went on to cite opinions of the Fifth Circuit and Second Circuit stating that awards of prejudgment interest on Jones Act claims were within the discretion of the trial courts:

> Moreover, even if prejudgment interest were available on plaintiff's past damages as a matter of law, *see Bush v. Diamond Offshore Co.*, 46 F. Supp. 2d 515, 523 (E. D. La. 1999) (allowance of prejudgment interest discretionary in Jones Act case tried to the court and not a jury), the court would be inclined to exercise its discretion to deny plaintiff this relief, insofar as plaintiff's actions in filing multiple lawsuits have caused the resolution of his claims to be delayed. *See Jones v. Spentonbush-Red Star Co.*, 155 F.3d 587, 593-94 (2d Cir. 1998) (delay occasioned by plaintiff justified denial of prejudgment interest).

2001 U.S. Dist. LEXIS 19293 at 54. The *Huss* court then examined whether there were grounds for denying prejudgment

interest, applying the "peculiar circumstances" analysis adopted by the Fifth, Second and Ninth Circuits, and ultimately concluded that "Plaintiff's conduct, which has generated delay and confusion, renders him ineligible for prejudgment interest." *Id.* at 55.

Thus, although the *Huss* court reiterated the vague "general rule" denying prejudgment interest, it relied upon the Jones Act analysis followed by other circuits to explain its ultimate denial of the award. This demonstrates that when specifically addressing the factual circumstances such as those in the instant case, the Sixth Circuit denies prejudgment interest on Jones Act claims tried to the court only when "peculiar circumstances" exist that warrant denial of the award.

Furthermore, the cases cited in *Huss* as the source of the "general rule," *Andersen* and *Oglebay*, were not Jones Act cases tried to the court. *Andersen* involved only general maritime claims, for which the court awarded prejudgment interest. *Andersen*, at 809, n. 6 ("we need not decide the issue of the applicability of the distinction [between personal injury and property damage awards] to Jones Act cases because we do not have such a case before us.") Likewise, *Oglebay*, (which *Andersen* cites as its source of the "general rule") involved an indemnity claim that was tried to a magistrate, who awarded prejudgment interest. *Oglebay*, at 362. Those cases are therefore distinguishable from the instant case.

Indeed, the history of the Sixth Circuit's "general rule" denying prejudgment interest on Jones Act claims, upon which the petitioner heavily relies, shows that the rule predates the Jones Act and that its original source has been thoroughly distorted over time. The source of the "general

rule" language is *Great Lakes Towing Co. v. Kelley Island Lime & Transportation Co.*, 176 F. 492 (6th Cir. 1910). *Great Lakes* involved a "libel" action brought by a steam barge owner against a towing company that caused the barge to collide with a pier. In considering the barge owner's claim for prejudgment interest, the court stated the following:

> The general rule of law, or practice rather, is to allow interest in cases where the amount of damages is uncertain and is matter for proof, from the date when they were liquidated — that is, fixed by judicial ascertainment — which in this case would be the date of filing the commissioner's report. The date of filing the interlocutory opinion was a year earlier than that. Thus the libelant was allowed a year's interest more than the rate above stated would allow. **But the rule is not a fixed one, and is subject to variation by the circumstances. Its application rests in the discretion of the jury, or of the court where it stands in the place of the jury, and the exercise of this discretion will not be reviewed unless it has been palpably abused.** The facts of this case are such as to show that the action of the court was not inequitable. The case had been a long time pending, and many of the large items of damages were for definite amounts of expenditure which are not now disputed either in their amount or necessity. The fixing of the date of the interlocutory opinion was, in a large sense, somewhat compensatory for these considerations, and was not an abuse of discretion.

Great Lakes, at 499 (emphasis added).

This excerpt reveals that the "general rule" so often cited by the Sixth Circuit is derived from a case that (1) does not involve the Jones Act, (2) announced that prejudgment interest awards lie within the discretion of the trier of fact, and (3) actually awarded prejudgment interest. In light of this history, it is clear that any reliance on *Great Lakes* and its progeny for the proposition that prejudgment interest is prohibited under the Jones Act would be absurd.

Therefore, contrary to the petitioner's argument, the Court must conclude from *Huss* that the Sixth Circuit recognizes that prejudgment interest on past Jones Act damages may be awarded in cases tried to the court, unless peculiar circumstances justify its denial. Any Sixth Circuit case to the contrary, relying on the "general rule" derived from *Great Lakes*, must be deemed an anomaly that is in error.

CONCLUSION

For the foregoing reasons, Regal Fish LTD.'s petition for writ of certiorari should be denied.

Respectfully submitted,

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